Doane Pet Care, DPC *and* UFCW Local 1000. Cases 17–CA–22346 and 17–RC–12220

September 20, 2004

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND MEISBURG

On April 21, 2004, Administrative Law Judge Thomas M. Patton issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order as modified.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Doane Pet Care, DPC, Miami, Oklahoma, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraphs 1(b) and (c) and reletter the subsequent paragraphs accordingly.

"(b) Soliciting employee grievances and making implied promises to remedy them during a union campaign."

2. Substitute the attached notice for that of the administrative law judge.

IT IS FURTHER ORDERED that Case 17–RC–12220 is severed and remanded to the Regional Director for further appropriate action.

Dated, Washington, D.C. September 20, 2004

Robert J. Battista, Chairman

Wilma B. Liebman, Member

Ronald Meisburg, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist any union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] In the absence of a challenge to the Board's decision in *Tri-County Medical Center*, 222 NLRB 1089 (1976), Chairman Battista and Member Meisburg adopt the judge's finding that the Respondent violated Sec. 8(a)(1) by maintaining and enforcing an unlawful no-access rule for off-duty employees. Chairman Battista and Member Meisburg note that there was no evidence of discriminatory enforcement of the no-access rule in this case.

In adopting the judge's finding that the Respondent's agent Marvelyn Stout violated Sec. 8(a)(1) by soliciting grievances, we do not rely on the judge's finding that Stout was visiting the plant in response to the Union's organizing drive. We also modify the judge's finding that the solicitation of grievances and the promise to remedy them constitute separate violations of Sec. 8(a)(1). As the judge indicated, the "essence of a solicitation of grievances violation is not the solicitation itself but the inference that the employer will redress problems." *Bell Halter, Inc*. 276 NLRB 1208, 1215 (1985), citing *University of Richmond*, 274 NLRB 1204 (1985). We shall modify the judge's recommended Order and notice accordingly.

We agree with the judge that the Respondent violated Sec. 8(a)(1) shortly before the election by announcing the possibility of a new bonus or incentive plan for the employees. The Respondent's corporate vice president, Debbie Schecterle, testified that she told employees that the company was having the "first" committee meeting on a new benefit the following week.

In the absence of exceptions, we adopt the judge's recommended dismissal of the allegation that Regional Human Resources Manager Larry Pruitt unlawfully solicited grievances at an August 2003 meeting.

On August 11, 2004, the Petitioner filed a Motion to Withdraw objections to the election in Case 17–RC–12220 in order to file a new petition. In the absence of opposition from the Employer, we grant the Petitioner's Motion and therefore need not pass on the Petitioner's objections. Accordingly, we will not issue a Direction of Second Election. Instead, we shall sever and remand Case 17–RC–12220 to the Regional Director for further appropriate action.

Choose not to engage in any of these protected activities.

WE WILL rescind our rule that prohibits employees at our Miami, Oklahoma plant from entering the premises during nonworking hours without permission, or failing to leave the premises within 30 minutes after the end of the shift, insofar as it prohibits access to property other than company buildings and working areas.

WE WILL NOT solicit employee grievances and make implied promises to remedy them during a union organizing campaign.

WE WILL NOT announce shortly before a union vote that new benefits such as a bonus or incentive program are being considered.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed to them by Section 7 of the National Labor Relations Act.

DOANE PET CARE, DPC

Charles T. Hoskin, Jr., Esq., for the General Counsel.
J. Craig Oliver, Esq. Boult, Cummings, Conners & Berry, PLC of Nashville, Tennessee, for the Respondent.
Joe Price, Jr., Organizer, of Oklahoma City, Oklahoma, for the Charging Party.

DECISION

STATEMENT OF THE CASE

THOMAS M. PATTON, Administrative Law Judge. A hearing was held in these cases at Miami, Oklahoma, on December 9, 2003.

The charge in the unfair labor practice case was filed by UFCW Local 1000 (the Union or Petitioner) on August 15, 2003.[1] The charge was amended on August 26. The complaint issued on October 21, and alleges violations of Section 8(a)(1) of the National Labor Relations Act (the Act) by Doane Pet Care, DPC (the Employer or Respondent). Respondent denies any violation of the Act.

The Union filed the petition in the representation case on August 1. The Board conducted an election on September 12, based upon a stipulated election agreement. There were about 40 eligible voters in the following agreed-upon unit (the unit):[2]

> All regular full-time and part time production, maintenance, and sanitation employees employed by the Employer at its facility located at 2020 Sixth St. SE, Miami, OK, but excluding all independent contractors, office clerical employees, salesmen, professional employees, guards, quality assurance employees, confidential employees and supervisors as defined in the Act.

The Union received 15 votes, 22 votes were against representation and there was one nondeterminative challenged ballot. The Union filed election objections on September 17, some of which were withdrawn. The remaining objections are as follows:

> 1. In early August 2003 the Employer solicited grievances from employees, made an implied promise of benefits to employees and remedied employee grievances to employees based on the solicitation of grievances.
> 2. On or about August 7, 2003, the Employer made a promise of benefits to employees by informing them, for the first time, that they were entitled to the use of the company attorney up to two times per year.
> 3. On or about August 21, 2003, the Employer made a promise of benefits to employees by informing them that only the Employer's non-union plants would be entitled to a "gain sharing" program which the Employer planned to implement.

On October 23, the Regional Director consolidated the representation case with the unfair labor practice case for hearing, ruling, and decision by an administrative law judge.

On the entire record, including my observation of the demeanor of the witnesses and after considering the briefs filed by the General Counsel and Respondent I make the following[3]

FINDINGS OF FACT

I. JURISDICTION

Doane Pet Care, DPC is a corporation headquartered in Brentwood, Tennessee, that manufactures pet food at several plants, including a facility in Miami, Oklahoma, the only facility involved in the present proceeding. Miami is a small town located in a largely rural area in northeast Oklahoma. The Miami plant manufactures pet treats and employs approximately 52 hourly and 11 salaried workers. Respondent admits and I find that it meets the Board's standards for asserting jurisdiction based on its operations and that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION

The Respondent admits and I find that UFCW Local 1000 is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

I. THE EVIDENCE

A. Employee No-Access Rule

The Union began an organizing attempt at the Miami plant in 2003. Employee Bob Greeley, a maintenance employee, contacted the Union and in June Union Agent Joe Price met with Greeley and several other employees. The employees began

[1] All dates are 2003 unless otherwise indicated.

[2] The unit description is set forth in a written posthearing stipulation submitted on February 12, 2004, that is received and made a part of the record.

[3] In assessing credibility, testimony contrary to my findings has not been credited, based upon a review of the entire record and consideration of the probabilities and the demeanor of the witnesses. See *NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1962).

soliciting coworkers to sign union cards. Most of the soliciting occurred at the plant. Greeley estimated that during the 2 weeks following the initial meeting with Price he talked to about 17-20 coworkers, all but two or three at the plant.

Larry Pruitt, a regional human resource manager, testified that he learned of the organizing at the Miami plant in late June. Pruitt's office is located at corporate headquarters in Brentwood, Tennessee. Pruitt was informed of the organizing by regional plant manager, Mike Bontrager and Miami plant superintendent, Dale O'Neal. O'Neal acknowledged that Greeley's support for the Union was the subject of discussions he had with Bontrager in late June.

Greeley usually worked from 6:30 a.m. to 2:30 p.m., but he was sometimes assigned to work different hours. On July 8, his shift began earlier and ended at 11 a.m. He was not scheduled to work that afternoon and left. He returned to the plant parking lot that day at about 2 p.m. to solicit for the Union. That was a time when other employees were arriving for a shift that started at 2:30 p.m.

The Employer maintained a rule restricting employee presence at the plant outside of work hours. The rule (the no-access rule) is contained in the employee handbook. Greeley had been given a copy of the handbook. The complaint alleges that the maintenance and enforcement of the no-access rule violated Section 8(a)(1) of the Act. The no-access rule has been in effect for over 4 years. It states:

> The following behaviors are classified as Group II Rules and are prohibited:
>
> 1. Entering the premises during non-working hours without permission, or failure to leave the premises within thirty minutes after the end of the shift.

The employee handbook goes on to describe 24 additional separately numbered employee behaviors as Group II Rules. The handbook states that violation of the Group II Rules could subject an employee to a four-step progressive discipline system that can lead to discharge.

Employee Rose Tunks was a utility operator at the plant who was scheduled to begin work at 2:30 p.m. on July 8. She was sitting in her car in the parking lot prior to reporting for her shift when Greeley approached her car at about 2 p.m. Greeley introduced himself and at Tunks' invitation he sat in her car and discussed the Union with her for about 15 minutes. The car was parked about 30 feet from the plant and could be observed from a window in the plant office. O'Neal observed the two employees through the window and went outside. Greeley noticed O'Neal and told Tunks that O'Neal probably saw him in her car and that he probably knew what they were discussing. Greeley then left Tunk's car and walked to his truck. Trunks later described the incident to her coworkers.

Before reaching his truck, Greeley stopped and had a brief conversation with O'Neal. There was some difference in the descriptions of the exchange related by Greeley and O'Neal. Greeley testified, "I looked at Dale and smiled. He smiled back and he caught my attention and he came up to me and said that he was going to do this nicely and said that I wasn't allowed on company property unless I was asked there or working or had permission to be there, and I told him that I understood and I left. O'Neal testified that he said, "Bob, you are—you realize our policy on being on the premises after hours. He grinned and said yes, I do, and he continued on." Greeley had not asked permission to be in the parking lot during nonwork time on July 28. He was not disciplined for the July 8 incident.

I find that O'Neal's account was as credibly offered and is as probable as that of Greeley. Since the evidence shows that Greeley was aware of the no-access rule, the substance of the two versions was similar. The message was that Greeley had violated the no-access rule. The General Counsel had the burden of establishing the credibility of Greeley over that of O'Neal regarding what was said during their conversation, which is alleged to have been an enforcement of the no-access rule against Greeley in violation of Section 8(a)(1). If the factors favoring the credibility of O'Neal are in equipoise with factors favoring Greeley, the alleged remarks as described by Greeley cannot be found to have occurred, insofar as they are inconsistent with O'Neal's testimony. *Tomatek, Inc.,* 333 NLRB 1350 (2000); *El Paso Natural Gas Co.,* 193 NLRB 333 (1971).

Greeley testified that a few weeks earlier he had parked in the plant parking lot at a time when he was not scheduled to work and entered the plant to pick up his uniforms that were in the breakroom without checking in at the office and without securing permission to be in the plant outside his shift time. The evidence does not show that management knew of this particular visit and he was not disciplined for the visit. Uniforms were provided by a uniform service. Greeley explained that he went to the plant to pick up uniforms outside of his working hours that day because the clean uniforms were delivered after he left work the prior day.

Greeley identified a single off-duty employee that he had seen in the plant on one occasion and identified another off-duty employee that he had seen in the plant on another day. Those employees did not testify and the record does not show that either was in the plant without permission.

Tunks described two occasions when she observed an identified off-duty employee in the plant selling school fundraiser goods without wearing required protective gear and a head covering. That employee did not testify. The record does not show that management knew of the activity. Bontrager denied that he was aware of the activity. Bontrager's denial was credibly offered and is not improbable because it seems likely that the employee's disregard of mandatory head covering and safety gear would not have been disregarded. Tunks also described an occasion when she observed an identified off-duty employee come in the front door. The record does not show that the employee did not go to the office or did not otherwise secure permission to be in the plant. That employee did not testify.

In addition to the employee handbook, the no-access rule was brought to the attention of employees in meetings. The Employer's witnesses testified that the primary reason for the no-access rule was safety. Particular concerns mentioned included general safety, workplace violence and terrorism. Bontrager and O'Neal testified that they had never denied an employee's request to be on the premises outside of working hours. The evidence does not establish that the Employer con-

doned employees being on the premises in violation of the no-access rule.

B. July 18 Conversation Between Marvelyn Stout and Bob Greeley

At the time of the organizing effort the Miami plant manufactured a product line of pet treats for Wal-Mart, a major customer. Marvelyn Stout was Doane's senior director/team leader for the Wal-Mart account. She testified that 13 of Doane's plants produced products for Wal-Mart and that her job was to "grow the Wal-Mart business." O'Neal described Stout as being a liaison with Wal-Mart. Stout's home and office was in Rogers, Arkansas, a community about eight miles from Bentonville, Arkansas, the location of the Wal-Mart corporate headquarters.[4] The record does not show that the Respondent employs other persons in Rogers and the General Counsel does not contend that Stout was a statutory supervisor.

On July 17 and 18 Stout was at the Miami plant, some 90 miles from Rogers. She was sent to the Miami plant in July by Dave Horton, a corporate vice president and the Respondent's general manager for North America. Horton sent Stout to Miami in response to a request made to him by Debbie Shecterle, Respondent's corporate vice president of people. Shecterle testified that she asked Horton to send somebody to the Miami plant who knew about Wal-Mart and how big a customer they were.

Managers who reported to Shecterle included a director of employment responsible for all employment issues, including labor relations; a director responsible for benefits and compensation; and three regional human resource managers. Larry Pruitt was the regional human relations manager for the Miami plant and eight other plants. Pruitt learned of the union organizing effort at the Miami plant in June. I infer that Shecterle was advised of the organizing effort when it came to Pruitt's attention. The Employer's response to a union organizing attempt would be within the area of responsibility associated with Shecterle's position. Shecterle does not claim that she was unaware of the organizing effort when she made the request to Horton that led to the dispatch of Stout to the Miami plant.

According to Stout, a routine part of her duties is visiting plants that manufacture products for Wal-Mart. Stout had last visited the Miami plant in 2001. The July visit to Miami, however, was not routine. It was the result of actions taken at a high corporate level and Shecterle, who did not supervise Stout, was responsible for Stout's July 2003 visit. Based upon the circumstances, I infer that Stout's trip to Miami in July was in response to the union activity.

On July 17 Stout made a presentation to the employees on each shift about some new Wal-Mart pet treats that were to be manufactured at the Miami plant and the importance of the product and the Wal-Mart account. Human relations manager Pruitt introduced Stout to the employees. Several other managers also attended. Pruitt has been involved in a number of union organizing campaigns. The July 17 presentation was followed by a question and answer session.

On July 18 Stout walked about the production areas. She testified that she customarily did this when she visited plants because of her interest in insuring that the Wal-Mart products were of the highest quality. While she was in the production area on July 18 she had a conversation with Greeley. No one else was present. The complaint alleges her remarks violated Section 8(a)(1).

Greeley and Stout testified about the conversation and their accounts differed in some respects. Greeley testified on direct examination:

> She came up and introduced herself again to me and I introduced myself to her and she asked me what, you know, how things were going and I told her things were going really well. And she said that she had heard that we had some problems there at the plant, and I said, well, yes. I said we're trying to form a union. And she also asked me, she said, you know, what, you know, what was causing all the turmoil for us to start a union and I told her that, well, we had—you know, told her about our attendance bonuses, our Christmas bonuses being taken away and that we had a big communication problem. . . .

She responded like she was really concerned. She asked me, she said if we could sit down in a meeting and talk about some problems. If she could arrange it with Larry Pruitt, would it be possible for me to attend. And I said yea, sure, you know, that'd be great, but I would like a witness in there with me. And she said sure, it would be okay for me to have a witness. And I chose Bill Wright.

Stout testified that Greeley approached her and opened the conversation. She testified on direct examination:

> There was a lady standing right there and somebody was sweeping the floor is what I remember and now I know that was Bob and he said so you're from Rogers, and I said yes, and he said, well I'm from Bentonville, and I said oh. And we chit-chatted a little bit about Arkansas and that I went to Springdale High School. And he said, well, I really appreciate you coming down, and I said, well, you're 'welcome, thanks for all you guys do for us on the Wal-Mart business on the new treats. And then he went into how there was a lot going on and how he was upset about various things. . . .
>
> He started talking about something about a uniform that was brought for some employee and he was upset that not everybody got uniforms and then he went right into something about Christmas bonuses and was upset about that, and then went right into their insurance had been raised and he thought that was unfair. . . .
>
> I said have you talked to Mike [Bontrager]. . . And he said it hasn't done any good. And I said, well, have you talked to Larry [Pruitt]. . . . He said I've talked to Larry and it's not done any good. . . . And I said, well, when's the last time you talked to him, and he said, well, it's been a while, and I said, well, maybe you should talk to him again. . . . And he said, he goes, okay, I will.

[4] See *Wal-Mart Stores, Inc.*, 340 NLRB No. 83 (2003). Distances between cities are based upon AAA North American Road Atlas (American Automobile Association, 1999).

Greeley was recalled as a rebuttal witness and denied that in the July 18 conversation there was any discussion of hometowns. On cross-examination, however, he acknowledged that he was from Bentonville, Arkansas.

It is probable that Stout's decision to stop near where Greeley was working and to make herself accessible to casual conversation with him was not a chance event. Stout was sent to Miami in response to the organizing effort. There was an opportunity for Greeley to be pointed out to her during the employee meeting the day before and it strains credulity to believe that she did not know that Greeley was a union organizer before their conversation. I conclude, however, that some of the testimony of Stout regarding what was said during the July 18 conversation is more probable and was more credibly offered. Stout was voluble and described the conversation in detail. In contrast, Greeley's testimony regarding what was said was terse and summary in nature and he demonstrated a propensity to shade his testimony. Because this was Greeley's first conversation with Stout, his testimony that Stout walked up and forthwith began questioning him in the fashion he described seems unlikely. The initial discussions regarding their hometowns and schools related by Stout had the ring of truth. Nevertheless, I found Greeley's testimony that Stout initiated a discussion of problems at the plant and that Stout asked what the problems were was credibly offered. Moreover, since the weight of the evidence is that Stout was at the plant in response to union activity, it is not improbable that she would try to discover the issues that motivated Greeley to initiate a union organizing effort. I do not credit Greeley's testimony that union organizing was explicitly mentioned. Stout acknowledged in her testimony that she asked Greeley if he would like to meet with Bontrager and Pruitt to address Greeley's concerns. Stout's conversation with Greeley was not shown to be consistent with any prior practice by her when she visited the plant.

C. July 18 Meeting of Greeley, Wright, Stout, Pruitt and Bontrager

After Stout spoke with Greeley on the shop floor on July 18, she arranged for Greeley to meet with management about an hour later. Present were Greeley, Stout, Bontrager, Pruitt and employee Bill Wright. All but Wright testified about the meeting. As noted above, Greeley asked for Wright be present as a witness to what was said. The descriptions of the meeting were not entirely consistent. The following is a composite of the credibly offered and probable testimony regarding the meeting.

The meeting lasted about an hour. There is no evidence that notes were taken or that the meeting was memorialized. At the meeting Greeley was invited to discuss the employee concerns. Both Greeley and Wright responded and the issues they raised were discussed. The issues included health insurance costs, some employees being charged for uniforms, and the loss of bonuses that had formerly been given to employees. Bontrager and Pruitt offered explanations for the elimination of bonuses and the high cost of insurance and stated that the uniform issue would be looked into. Pruitt described related, without details, that the Employer had examined different bonus plans. I do not credit Greeley's claim that Bontrager said that Respondent's president had a profit-sharing plan "on his radar screen," but that Bontrager was not able to talk about the plan at that time. While there conclusionary testimony by Bontrager that he had an "open door" policy there is no credible and probative evidence that the meeting was consistent with a previous practice by management have such meetings with individual employees to solicit and address grievances.

D. August Meetings Involving Pruitt and Willard Gilman

In early August Pruitt participated in several group meetings of employees at the plant. At one of the meetings, employee Willard Gilman understood Pruitt to ask why employees reached the point where they thought they needed a union. Two days later Gilman told O'Neal that he would like to talk with Pruitt one-on-one. Pruitt met with Gilman. Pruitt and Gilman testified about their meeting and their testimony is generally consistent. The following is based upon the credibly offered and more probable portions of their testimony.

Gilman began by asking Pruitt if he wanted to know why the employees reached the point where they needed a union and Pruitt said that he was interested. Gilman described to Pruitt employees' concerns about insurance, the loss of bonuses, and wage differences between maintenance and production employees. Gilman described a long-standing problem he was having with an insurance claim for his wife's medical bills. Gilman had contacted the insurance carrier but the bills had not been paid. Following the meeting, Pruitt had an administrative employee at the plant review the problem. She contacted Gilman and told him to bring her the medical bills that had not been paid in the past year and one-half. He brought in the bills and they were paid within about 3 months. Pruitt followed the same procedure he customarily followed when an employee contacted him about an insurance problem that the insurance carrier may not have adequately addressed.

E. August 21 Employees Meeting with Shecterle

On August 21, Shecterle spoke at a meeting of employees at the plant. This was her fifth visit to the Miami plant during her 5-year tenure. She testified that she spoke to employees on August 21 because there apparently had been a lot of discussion among the employees regarding benefits and the rising costs of health care. This was 22 days before the representation election. Shecterle testified that after making her opening remarks and talking about the progress that Doane has made over the last 4 or 5 years, she opened the meeting to questions, with the expectation that the employees would have questions regarding benefits. During the question and answer period there were employee questions and remarks regarding an "employee gains program." The General Counsel contends that Shecterle's remarks regarding an employee gains program were unlawful.

Shecterle, Greeley, Gilman and Tunks testified about the meeting. Tunks testified that Shecterle mentioned an employee gains program at an employee meeting. The testimony was elicited by leading questions and Tunks provided no significant context or detail. Her testimony regarding this issue is of little use in determining what was said.

Greeley testified as follows regarding Shecterle's remarks:

Q. What did Ms. Shecterle discuss at the meeting?

A. Ms. Shecterle discussed some benefits that we had, going over our finances on our benefits. She also touched on some sharing, some profit—or some gains sharing, I believe is what she—is the term she used.
Q. Okay.
A. She said that there was—that they were getting ready to introduce a gains sharing plan, that the committee—I believe she held a meeting on a Friday and the committee was supposed to meet on that following Monday to work out the details to see if it was going to fly and then they were going to try an experimental program with it and, if it worked, she would introduce it—they would introduce it to the Doane's plants. It would be available for non-union plants, but union plants it would have to be negotiated for.
Q. And, just to be clear, she talked about a meeting that was going to be held on the following Monday—
A. Yes.
Q. —concerning this plant?
A Yes.
Q. Prior to this meeting, had you ever heard anybody at the company refer to a gains sharing program?
A. No.
Q. What about an employee gains program?
A. No.

Gilman testified as follows regarding Shecterle's remarks:

Q. Okay. Has anybody at the company ever talked to you about an employee gain program?
A. Yes, sir.
Q. Who was that?
A. Debbie Shecterle.
Q. Okay. Do you recall when she talked about an employees gain program?
A. She talked about it in it was July sometime.
Q. Okay. Was this in a group meeting?
A. Yes, sir.
Q. Okay. Do you recall what she said about an employee gain program?
A. The main thing I can recall was the plant -- they was working on it for the plants that wasn't union and the union plants would have to negotiate it.
Q. Prior to this meeting, had anybody from the company ever talked about an employee gains program?
A. Ever time we mentioned what happened to our bonuses, they talked about employee gain. It had been going on for three or four years or either employee gain or production bonuses.

Shecterle testified at length regarding the meeting and the discussion of an "employee gains program." According to Shecterle the employees at the meeting expressed concerns regarding bonuses that had been discontinued. Shecterle testified that she told the employees that an employer committee would be holding its first meeting the following week, to consider what a possible incentive program for employees and that if an incentive program was developed, it would first be tested at a plant. She testified that in response to an employee question of whether employees at the Employer's plant in Joplin, Missouri would be eligible for such an incentive plan she replied that if a plant had a union contract an incentive plan would have to be negotiated with the union. Shecterle testified that the term "employee gains program" would not be a correct name for the program and that she did not initially use the term, but acknowledged that she used the term because the employees were using that term in their questions and remarks.

The testimony of Greeley, Gilman, and Shecterle are generally consistent. With some exceptions and additions that will be discussed, the more detailed, probable and credibly offered testimony of Shecterle is credited. I credit Gilman's testimony that an employee gains program had been mentioned to employees in the plant by management in the past when employees complained of lost bonuses. The inconsistent testimony of Greeley does not warrant a different conclusion. Greeley's testimony, elicited with a leading question, that Shecterle told the employees that the scheduled management meeting "concerned this plant" was not corroborated and is not credited.

Regarding the timing of the implementation of an incentive or bonus plan Shecterle testified:

Q. One or more witnesses earlier today has also talked about a test or trial period for a bonus.
A. Uh huh.
Q. Did that subject come up?
A. It did. In the course of the conversation saying we were going to be meeting, I wanted to make it clear that, whatever we decided, we would need to test it to make sure that it worked because there's nothing worse than putting an incentive plan out there that fails and then you—you hurt the morale of the employees and lose their trust, so that, whatever we ended up designing, we would be testing somewhere prior to rolling it out and that it would be rolled out over a period of years.

I do not read this testimony as stating that the employees at the meeting were told that implementation would take "a period of years." Rather, it appears to be her volunteered explanation of what would occur. Considered as testimony of what was said at the meeting, it is not credited. It is highly improbable that the employee witnesses would not have recalled a statement by Shecterle the incentive program under consideration could not be implemented for "a period of years."

II. ANALYSIS

A. The No-Access Rule and its Enforcement

In arguing that the no-access rule impermissibly restricted employee presence in the parking lot the General Counsel relies on the Board's decisions in *Tri-County Medical Center*, 222 NLRB 1089 (1976), and *Teksid Aluminum Foundry*, 311 NLRB 711 (1993).[5] In *Tri-County Medical Center* the Board states that a no-access rule concerning off-duty employees:

> [S]uch a rule is valid only if it (1) limits access solely with respect to the interior of the plant and other working areas; (2) is clearly disseminated to all employees; and (3) ap-

[5] The General Counsel also cites *Santa Maria El Mirador*, 340 NLRB No. 84 (2003). That case is inapposite because, unlike the present case, it involved a no-access rule that was promulgated in response to protected employee activity.

> plies to off-duty employees seeking access to the plant for any purpose and not just to those employees engaging in union activity. Finally, except where justified by business reasons, a rule which denies off-duty employees entry to parking lots, gates, and other outside nonworking areas will be found invalid.

In *Teksid Aluminum Foundry* employer was found to have violated that Act by posting a memorandum reminding employees of a previously posted policy that employees were allowed to be on company premises only 30 minutes before and after their scheduled worktimes and advising them that they were subject to discipline if they violated the rule. That employer offered no reason for maintaining the rule or for posting the memorandum at the outset of the union drive. The Board adopted the judge's conclusion, based on *Tri-County Medical Center*, that the rule unduly limited the exercise of protected organizational rights and thereby violated Section 8(a)(1).

The Respondent contends that the challenged rule in the present case is distinguishable from the rules addressed by the Board in *Tri-County Medical Center* and *Teksid Aluminum Foundry* because it only requires off-duty employees to request permission to be on Respondent's property. The Respondent urges that its employees' right to organize must be balanced with the Employer's property rights and that a proper accommodation of these countervailing rights should permit the Employer to require off-duty employees to obtain permission to be in the parking lot.

The Employer stresses that in *Teksid Aluminum Foundry* the Board affirmed the judge's dismissal of an allegation that an employer unlawfully engaged in surveillance by means of a sign-in/sign-out procedure that required persons seeking entrance state their reason for entering the premises. The premises apparently included an employee parking area. The Board concluded that the evidence was insufficient to establish an unlawful purpose or effect, noting, "There is, for example, no evidence that the statement, 'I work here,' would not have been an acceptable reason." Id. at fn. 2.

In support of its claim of business justification, the Respondent contends, with supporting testimony, that the no-access rule permits all persons to be accounted for in case of an emergency, protects employees from harassment and assault and protects vehicles from theft and damage. The Employer argues that if an employee's activity is not declared, the Employer would have to watch the employee until the employee's purpose was discovered, to protect employees and property in the parking lot. The Employer acknowledges that while an off-duty employee might falsify the employee's true purpose, the Company could monitor the situation to make sure the employee's conduct was consistent with the employee's stated purpose.

The Employer's contentions are not specious on their face, but the Employer's property rights must be balanced against the employees' Section 7 rights. Implicit in employees seeking permission to engage in Section 7 activity is disclosing the activity planned. Compelling employees to declare to a supervisor that they want permission to engage in union organizing in the parking lot would have the foreseeable effect of discouraging the protected activity.

The facts of the present case are analogous to the situation in *Mediaone of Greater Florida, Inc.*, 340 NLRB No. 39 (2003), where the Board concluded that a provision in an employee handbook prohibiting employees from "entering company property after hours without authorization" violates Section 8(a)(1) of the Act under the *Tri-County Medical Center* standards, absent some business justification.

The Respondent has not stated business reasons sufficient to require off-duty employees who wish to engaged in Section 7 activity to ask permission to be in the parking lot and the rule accordingly violates Section 8(a)(1). Because the rule is unlawful, its enforcement against Greeley violated Section 8(a)(1). Respondent must rescind that rule insofar as it prohibits access to property other than company buildings and working areas, remove it from its employee handbook, and advise the employees in writing that the rule is no longer being maintained. *Mediaone of Greater Florida*, supra.

B. July 18 Conversation Between Marvelyn Stout and Bob Greeley

The answer to the complaint denies that Marvelyn Stout acted as an agent of the Respondent in her dealings with Greeley on July 18. In *Cooper Industries*, 328 NLRB 145 (1999), the Board stated:

> The Board applies common law principles of agency when it examines whether an employee is an agent of the employer while making a particular statement or taking a particular action. Under these common law principles, the Board may find agency based on either actual or apparent authority to act for the employer. As to the latter, "[a]pparent authority results from a manifestation by the principal to a third party that creates a reasonable basis for the latter to believe that the principal has authorized the alleged agent to perform the acts in question." The test is whether, under all the circumstances, employees "would reasonably believe that the [alleged agent] was reflecting company policy and speaking and acting for management." Thus, it is well settled that an employer may have an employee's statement attributed to it if the employee is "held out as a conduit for transmitting information [from management] to other employees." [Citations omitted].

Applying those principles to the evidence in the present case, it is clear that Respondent is responsible for the actions of Stout on July 18. Stout was at the plant at the request of corporate management and all employees were assembled to hear her speak. Human Relations Manager Pruitt, a manager whose office was at corporate headquarters, introduced Stout to the employees. At a minimum, employees would reasonably believe that Stout spoke for management. Accordingly, I conclude that Stout possessed at least apparent authority when she spoke with Greeley on July 18.

In addition, the evidence shows that Stout was sent to the Miami plant in response to the organizing drive. Thus, she did not initiate the trip to Miami. She was dispatched to Miami by a corporate vice president for North American operations; this was anything but a routine assignment. Moreover, the assignment was made at the request of a corporate vice president

responsible for labor relations. Stout's explanation that she was walking around the production area to help insure the quality of the product produced for Wal-Mart was unconvincing. Stout was in sales. The record does not show that her training, experience, or responsibility related to production operations or quality control. All this is consistent with an inference, which I draw, that the meeting with Greeley, her questioning of Greeley and her arrangement of a management meeting with Greeley was a calculated part of the Employer's antiunion effort. The evidence establishes that Stout was an agent of the Respondent within the meaning of Section 2(13) of the Act.

An employer's solicitation of grievances in the midst of a union campaign inherently constitutes an implied promise to remedy the grievances. *Laboratory Corp. of America Holdings*, 333 NLRB 284 (2001); *Maple Grove Health Care Center*, 330 NLRB 775 (2000). Stout's conversation with Greeley did not occur as a part of a practice of the Respondent to solicit and address employee grievances. Cf. *Wal-Mart Stores, Inc.*, 339 NLRB No. 153 (2003). The Respondent violated Section 8(a)(1) of the Act by Stout soliciting Greeley's grievances and made an implied promise a remedy for the grievances by proposing and arranging a meeting with management. *Clark Distribution Systems, Inc.*, 336 NLRB 747, 748 (2001).

C. July 18 Meeting of Greeley, Wright, Stout, Pruitt and Bontrager

At the meeting of Greeley, Wright, Stout, Pruitt, and Bontrager on July 18 Greeley was invited to discuss the employee concerns. Pruitt and Bontrager knew Greeley was a primary union organizer. Greeley and Wright raised employment issues that were addressed by Pruitt and Bontrager. The issues included health insurance costs, some employees being charged for uniforms, and the loss of bonuses that had formerly been given to employees. Bontrager and Pruitt offered explanations of why the bonuses were eliminated, discussed the high cost of insurance and stated that the uniform issue would be looked into. Pruitt related, without details, that the Employer had examined different bonus plans. Thus, employee grievances were solicited from the known union organizer and management held out the possible resolution of the grievances. The meeting was the outgrowth of Stout's unlawful acts that preceded the meeting and Stout proposed the meeting. By the acts of Pruitt and Bontrager in this transaction, the Respondent solicited employee complaints and grievances and implicitly promised its employees increased benefits and improved terms and conditions of employment if they refrained from supporting the Union. An employer's solicitation of grievances in the midst of a union campaign inherently constitutes an implied promise to remedy the grievances. *Laboratory Corp. of America Holdings*, 333 NLRB 284 (2001); *Maple Grove Health Care Center*, 330 NLRB 775 (2000). The meeting with Greeley and Wright did not occur as a part of a practice of the Respondent to solicit and address employee grievances. Cf. *Wal-Mart Stores, Inc.*, 339 NLRB No. 153 (2003). The Respondent violated Section 8(a)(1) of the Act by soliciting and addressing the employees' grievances. *Clark Distribution Systems, Inc.*, 336 NLRB 747, 748 (2001).

D. August Meetings Involving Pruitt and Willard Gilman

Willard Gilman understood Pruitt to ask at a meeting in August why employees reached the point where they thought they needed a union. The evidence does not show this to have been an inquiry calculated to elicit a response. Rather, it appears to have been merely a rhetorical question in the course of a campaign speech. This conclusion is consistent with Gilman's question to Pruitt 2 days later of whether he wanted to hear why employees were interested in a union. I find that the General Counsel has not proven that Pruitt's remarks to the group of employees were unlawful.

Pruitt's agreement to meet with Gilman at Gilman's request and Pruitt's efforts, consistent with his usual procedures, to remedy the insurance problem, were not unlawful.

E. August 21 Employee Meeting with Shecterle

Absent a legitimate business justification, an employer's announcement shortly before a representation election of a significant new benefit or announcing that such a new benefit is being considered tends to interfere with employees' Section 7 rights, in violation of Section 8(a)(1) of the Act. *Lutheran Home of Northwest Indiana, Inc.*, 315 NLRB 103 (1994); *American Red Cross*, 324 NLRB 166 (1997). The evidence shows that Shecterle announced that corporate management was to meet regarding a new bonus or incentive program the next week.

The Employer contends that Shecterle's remarks were not unlawful because nothing was promised. This argument is unconvincing. The mere holding out of the possibility of a new benefit, especially by a high-ranking corporate officer, tends to interfere with employees' Section 7 rights.

The Employer also argues that the plan was not new. This contention is inconsistent with the evidence. A "gains sharing program" had been mentioned in the past, apparently by supervision at the Miami plant. However, Shecterle testified that what she discussed at the meeting was something new and different. Indeed, she said that the plan that was to be considered at the corporate level the following week could not properly be described as gains sharing.

The Employer notes that Shecterle's remarks were in response to employee questions. In the context of the facts of this case, I attach little significance to this fact. Management was aware of the employees' concern that they receive some replacement for bonuses that had been discontinued and the probability that there would be an employee question that would give Shecterle the opportunity to discuss a new incentive plan was high and, I infer, not unanticipated.

The Respondent has not established a legitimate business justification for Shecterle's announcement shortly before the representation election that the Respondent was to meet the following week regarding a new bonus or incentive program. The announcement violated Section 8(a)(1) of the Act.

CONCLUSIONS OF LAW

1. The Respondent is an employer within the meaning of Section 2(2) of the Act engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent violated Section 8(a)(1) of the Act by maintaining and enforcing a rule that prohibited employees at its Miami, Oklahoma plant from entering the premises during nonworking hours without permission, or failing to leave the premises within 30 minutes after the end of the shift, insofar as it prohibits access to property other than company buildings and working areas.

4. The Respondent violated Section 8(a)(1) of the Act by soliciting employee grievances during a union campaign.

5. The Respondent violated Section 8(a)(1) of the Act by making implied promises to remedy employee grievances during a union campaign.

6. The Respondent violated Section 8(a)(1) of the Act by announcing at an employee meeting shortly before a representation election that a new bonus or incentive program was being considered.

7. The Respondent has not otherwise violated the Act.

Rulings and Conclusions on the Election Objections

1. Objection 3 relating to Shecterle's announcement shortly before the representation election that management was to meet the following week regarding a new bonus or incentive program, which has been found to have violated Section 8(a)(1) of the Act, has been proven.

2. The Employer has been found to have violated Section 8(a)(1) of the Act by maintaining during the period between the filing of the petition and the election a rule that prohibited employees at its Miami, Oklahoma plant from entering the premises during nonworking hours without permission, or failing to leave the premises within 30 minutes after the end of the shift, insofar as it prohibits access to property other than company buildings and working areas. Although not raised as an objection, it was fully litigated and should be considered in determining whether the election should be set aside. *White Plains Lincoln Mercury*, 288 NLRB 1133, 1138–1139 (1988).

3. Objections 1 and 2 have not been proven.

4. The unfair labor practices committed by the Respondent during the period between the filing of the petition and the election is conduct that interferes with the employees' free choice and is not de minimis. Accordingly, I conclude that the election should be set aside and a new election should be directed. See *Bon Appetit Management Co.*, 334 NLRB 1042 (2001).

THE REMEDY

Having found that the Respondent has engaged in unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended[6]

ORDER

The Respondent Doane Pet Care, DPC, its officers, agents, successors, and assigns, at the Miami, Oklahoma plant shall

1. Cease and desist from

(a) Maintaining and enforcing a rule that prohibited employees at its Miami, Oklahoma plant from entering the premises during nonworking hours without permission, or failing to leave the premises within 30 minutes after the end of the shift, insofar as it prohibits access to property other than company buildings and working areas.

(b) Soliciting employee grievances during a union campaign.

(c) Making implied promises to remedy employee grievances during a union campaign.

(d) Announcing at an employee meeting shortly before a representation election that a new bonus or incentive program was being considered.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind and remove from the employee handbook the rule that prohibits employees at its Miami, Oklahoma plant from entering the premises during nonworking hours without permission, or failing to leave the premises within 30 minutes after the end of the shift, insofar as it prohibits access to property other than company buildings and working areas.

(b) Within 14 days after service by the Region, post at its Miami, Oklahoma facility copies of the attached notice marked "Appendix."[7] Copies of the notice, on forms provided by the Regional Director for Region 17, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that while these proceedings are pending the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at the Miami, Oklahoma plant at any time since February 15, 2003.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the election is set aside and the representation case is severed from the unfair labor practice case and is remanded to the Regional Director of Region 17 for the conduct of a second election when he deems the circum-

[6] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommend Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[7] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

stances will permit a free choice by the employees and for all further processing.

Dated, San Francisco, California, April 21, 2004.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities

WE WILL rescind our rule that prohibits employees at our Miami, Oklahoma plant from entering the premises during nonworking hours without permission, or failing to leave the premises within 30 minutes after the end of the shift, insofar as it prohibits access to property other than company buildings and working areas.

WE WILL NOT solicit employee grievances during a union campaign.

WE WILL NOT make implied promises to remedy employee grievances during a union campaign.

WE WILL NOT announce shortly before a union vote that new benefits such as a bonus or incentive program are being considered.

WE WILL NOT, in any similar way, interfere with your rights to act together or with a union for your benefit and protection.

DOANE PET CARE, DPC